

1 and directing the payment of benefits or, alternatively, remanding the
2 case for a new hearing before a different administrative law judge; and
3 Defendant requests that the Commissioner's decision be affirmed. The
4 Court has taken the parties' Joint Stipulation under submission without
5 oral argument.

6
7 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
8

9 Plaintiff filed her application for DIB on December 1, 2004.
10 (Administrative Record ("A.R.") 42.) Plaintiff claims to have been
11 disabled since March 1, 2003, due to osteoporosis and status post brain
12 aneurysm with residual memory impairment, concentration problems, and
13 headaches. (A.R. 48-49, 78, Joint Stipulation ("Joint Stip.") at 2.)
14 She has past relevant work experience in payroll, bookkeeping, and as a
15 receptionist. (A.R. 49, 115-16.)
16

17 The Commissioner denied Plaintiff's claim for benefits initially
18 and upon reconsideration. (A.R. 21, 28.) On June 15, 2006, Plaintiff,
19 who was represented by counsel, testified at a hearing before
20 Administrative Law Judge F. Keith Varni ("ALJ"). (A.R. 112-27.) On
21 July 24, 2006, the ALJ denied Plaintiff's claim (A.R. 10-13), and the
22 Appeals Council subsequently denied Plaintiff's request for review of
23 the ALJ's decision (A.R. 3-5).
24

25 **SUMMARY OF ADMINISTRATIVE DECISION**
26

27 In his July 24, 2006 written decision, the ALJ found that Plaintiff
28 has not engaged in substantial gainful activity during the period at

1 issue. (A.R. 11, 13.) The ALJ determined that Plaintiff does not have
2 a severe physical or mental impairment. (A.R. 12-13.) The ALJ also
3 found that Plaintiff does not have an impairment or combination of
4 impairments listed in, or medically equivalent to an impairment listed
5 in Appendix 1, Subpart P, Regulation No. 4. (*Id.*) In addition, the ALJ
6 found that Plaintiff was not under a disability, as defined in the
7 Social Security Act, at any time through the date of this decision.
8 (*Id.*)

9
10 Accordingly, the ALJ concluded that Plaintiff was not disabled
11 within the meaning of the Social Security Act during the time period at
12 issue. (A.R. 10.)

13 14 STANDARD OF REVIEW

15
16 This Court reviews the Commissioner's decision to determine
17 whether it is free from legal error and supported by substantial
18 evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). The
19 Commissioner's decision must stand if it is supported by substantial
20 evidence and applies the appropriate legal standards. Saelee v. Chater,
21 94 F.3d 520, 521 (9th Cir. 1996). Substantial evidence is "more than a
22 mere scintilla but less than a preponderance -- it is such relevant
23 evidence that a reasonable mind might accept as adequate to support the
24 conclusion." Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995).

25
26 Although this Court cannot substitute its discretion for that of
27 the Commissioner, this Court nonetheless must review the record as a
28 whole, "weighing both the evidence that supports and the evidence that

1 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y. of
2 Health and Human Servs, 846 F.2d 573, 576 (9th Cir. 1988); see also
3 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
4 responsible for determining credibility, resolving conflicts in medical
5 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
6 1035, 1039-40 (9th Cir. 1995). This Court must uphold the
7 Commissioner's decision if it is supported by substantial evidence and
8 free from legal error, even when the record reasonably supports more
9 than one rational interpretation of the evidence. Id. at 1041; see also
10 Morgan v. Comm'r. of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir.
11 1999); Flaten v. Sec'y., 44 F.3d 1453, 1457 (9th Cir. 1995).

12 13 DISCUSSION

14
15 Plaintiff alleges two issues. First, she contends that the ALJ
16 failed to develop the record properly. Second, she alleges that the ALJ
17 improperly failed to consider lay witness testimony. (Joint Stip. at 2-
18 3.)

19 20 A. The ALJ Failed To Develop The Record Adequately Regarding Kaiser 21 Medical Records.

22
23 Plaintiff contends that, by making no effort to assist in obtaining
24 her complete medical records for the past two years from Kaiser, the ALJ
25 failed to develop the record, thereby committing legal error. (Joint
26 Stip. at 4.)

27
28 In social security cases, the ALJ has a duty to fully and fairly

1 develop the record. Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.
2 2001)(citing Smolen, 80 F.3d at 1288); see also 20 C.F.R. § 416.1444 (at
3 the administrative hearing, the ALJ "looks fully into the issues").
4 This is true even when the claimant is represented by counsel. Brown v.
5 Heckler, 713 F.2d 441, 442-43 (9th Cir. 1993). The ALJ's duty to
6 develop the record extends from the basic premise that Social Security
7 hearings are not adversarial in nature. Orcutt v. Barnhart, 2005 WL
8 2387702, *3 (C.D. Cal. 2005); see also Sims v. Apfel, 530 U.S. 103, 110-
9 11 (2000)("It is the ALJ's duty to investigate the facts and develop the
10 arguments both for and against granting benefits").

11
12 The record suggests that there could be additional and pertinent
13 medical evidence regarding Plaintiff's psychiatric history, which was
14 not reviewed by the ALJ. Accordingly, the ALJ's duty to develop the
15 record was triggered. 20 C.F.R. § 404.1512(e) provides that the
16 Administration "will seek additional evidence or clarification from your
17 medical source when the report from your medical source contains a
18 conflict or ambiguity that must be resolved, the report does not contain
19 all of the necessary information, or does not appear to be based on
20 medically acceptable clinical and laboratory diagnostic techniques."
21 See also Tonapetyan, 242 F.3d at 1150 ("ambiguous evidence, or the ALJ's
22 own finding that the record is inadequate to allow for proper evaluation
23 of the evidence, triggers the ALJ's duty to 'conduct an appropriate
24 inquiry'"; quoting Smolen, 80 F.3d at 1288). An ALJ may "discharge" his
25 duty in various ways, such as: "subpoenaing the claimant's physicians,
26 submitting questions to the claimant's physicians, continuing the
27 hearing, or keeping the record open after the hearing to allow
28 supplementation of the record." *Id.*

1 The fact that Kaiser's treatment of Plaintiff resulted in a
2 "disability off work order" and a "return to work order" (A.R. 125)
3 indicates that these records likely contain information relevant to
4 Plaintiff's application for DIB. Plaintiff's medical records from
5 Kaiser are not a part of the record, nor were they reviewed by the
6 Consultative Examiner. (A.R. 88.) See Nalley v. Apfel, 100 F. Supp. 2d
7 947, 953 (S.D. Iowa 2000) ("when a claimant is sent to a doctor for a
8 consultative examination, all the available medical records should be
9 reviewed by the examiner").

10
11 There are few facts to suggest that the Kaiser medical records are
12 actually unavailable. The record is ambiguous as to the nature and
13 extent of Plaintiff's efforts to obtain her medical records from Kaiser.
14 The ALJ states in his decision, Plaintiff "tried to get her medical
15 records from Kaiser but has been unable to do so." (A.R. 12.) But
16 Plaintiff herself said nothing about what she had actually done to
17 attempt to get her medical records. At the June 15, 2006 hearing before
18 the ALJ, Plaintiff stated that McKee Medical Clinic, from which she
19 wished to obtain treatment, had "been trying for the last two years to
20 get my medical records from Kaiser" (A.R. 120), "and so far they've not
21 been able to get paperwork from the physician" (A.R. 125). Plaintiff
22 then responded affirmatively to the ALJ's leading questions, "And you've
23 tried to get those records yourself from Kaiser and haven't been able to
24 get them?" and "So, the records just don't exist anymore as far as you
25 know?" (A.R. 125-26.) Absent a declaration from Kaiser, conclusive
26 evidence is absent that the Plaintiff's medical records have been lost
27 or destroyed.

1 To fully assess Plaintiff's ability to engage in substantial
2 gainful activity, her Kaiser medical records should be reviewed. The
3 ALJ made no effort to obtain these medical records and, thereby, to
4 ascertain the extent of the Plaintiff's impairment(s). As a result, the
5 ALJ has failed to fully and fairly develop the record. See Higbee v.
6 Sullivan, 975 F.2d 558, 561-62 (9th Cir. 1991)(remanding case in order
7 to develop the record); McAllister v. Sullivan, 888 F.2d 599, 603 (9th
8 Cir. 1989)(remand appropriate to remedy defects in the record). To
9 ensure that a proper search for these medical records is made, the ALJ
10 should issue a subpoena to Kaiser for the production of Plaintiff's
11 medical records. Plaintiff shall provide any and all authorizations
12 necessary to facilitate the production of her medical records by Kaiser.

13
14 Accordingly, remand for further development of the record is
15 needed.

16
17 **B. The ALJ Should Consider The Lay Witness Statement Of Plaintiff's**
18 **Mother On Remand.**

19
20 "Lay testimony as to a claimant's symptoms is competent evidence
21 that an ALJ must take into account, unless he or she expressly
22 determines to disregard such testimony and gives reasons germane to each
23 witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
24 2001); see also Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996);
25 Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993). An ALJ may
26 "properly discount lay testimony that conflict[s] with the available
27 medical evidence." Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir.
28 1984). When, however, a lay witness testifies about a claimant's

1 symptoms, which may affect the claimant's ability to work, such
2 testimony is competent evidence and, therefore, cannot be disregarded
3 without comment. *Id.*

4
5 Plaintiff alleges that the ALJ erred by not considering the
6 testimony of Plaintiff's mother and failing to provide reasons for
7 rejecting her testimony. (Joint Stip. At 10.) Plaintiff's mother sees
8 Plaintiff on a daily basis, and she reported that Plaintiff is unable to
9 handle her own finances (A.R. 58, 59), has uncontrolled anger (A.R. 59),
10 cannot complete tasks or concentrate (A.R. 60), and has difficulty
11 following instructions (A.R. 60). In evaluating the weight of lay
12 witness evidence, the Ninth Circuit has observed: "An eyewitness can
13 often tell whether someone is suffering or merely malingering. While
14 this is particularly true of witnesses who view the claimant on a daily
15 basis, the testimony of those who see the claimant less often still
16 carries some weight." Dodrill, 12 F.3d at 919.

17
18 As this case is being remanded so that the ALJ can develop the
19 record, and Plaintiff's mother's questionnaire regarding Plaintiff's
20 limitations and symptoms is relatively brief (see A.R. 55-62), the ALJ
21 should consider her statements on remand prior to rendering his ultimate
22 determination regarding Plaintiff's disability.

23
24 **C. Remand Is Required.**

25
26 Here, remand is appropriate to allow the ALJ the opportunity to
27 correct the above errors. See, e.g., Benecke v. Barnhart, 379 F.3d 587,
28 593 (9th Cir. 2004)(remand for further proceedings is appropriate if

enhancement of the record would be useful); McAllister, 888 F.2d at 603
(remand appropriate to remedy defects in the record).

CONCLUSION

Accordingly, for the reasons stated above, the Commissioner's
decision is REVERSED, and this case is REMANDED for further proceedings
consistent with this Memorandum Opinion and Order. Judgment shall be
entered reversing the decision of the Commissioner, and remanding the
matter for further administrative action consistent with this Memorandum
Opinion and Order.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve
copies of this Memorandum Opinion and Order and the Judgment on counsel
for Plaintiff and for Defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 31, 2008

_____/s/
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE